

IN THE MATTER OF LICENSE NO. 367410
MERCHANT MARINER'S DOCUMENT NO. Z-1199556-D1
AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Charles Leonard MAULL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1845

Charles Leonard MAULL

This appeal has been taken in accordance with Title 46 United States code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 22 June 1970, an Examiner of the United States Coast Guard at Galveston, Texas, revoked appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a third mate on board SS STEEL VOYAGER under authority of the document and license above captioned, Appellant:

- (1) on or about 1 March 1970, at sea, assaulted and battered by beating one George S. Haswell, an officer of the ship; and
- (2) on or about 21 November 1969, at sea, assaulted and battered the same person.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of STEEL VOYAGER and the testimony of three witnesses.

In defense, Appellant offered in evidence his own testimony and that of two other witnesses.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 29 June 1970. Appeal was timely filed on 16 July 1970. Appeal was perfected on 4 November 1970.

FINDINGS OF FACT

On both dates in question, Appellant was serving as a third mate on board SS STEEL VOYAGER and acting under authority of his license and document while the ship was at sea.

On 21 November 1969, Appellant, Haswell, and two other officers had been playing pinochle. When the game ended one of the officers dropped a pin from his wristwatch on the deck when his watch band broke. Haswell assisted him in looking for it. Some conversation ensued, after which Appellant violently pushed Haswell up against a bulkhead. A fourth officer caused Appellant to desist.

On 1 March 1970; at about 1800, Appellant entered Haswell's quarters, broke a liquor bottle, and out Haswell about the head with the broken neck of the bottle. The injuries required Haswell's hospitalization in Galveston.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that conflicts in testimony require reversal of the Examiner's findings and that the order is too severe.

APPEARANCE: Brown, Shiels & Barros, Dover, Delaware, by William M. Chasanov, Esq.

OPINION

I

There is one question that I would like to lay to rest forever. Appellant argues that the victim of his assaults was nowhere placed "in fear" of Appellant's actions.

There is much confusion in the law generated by the fact that there is a body of law related to assault and battery as a criminal matter which is distinct from the law of assault and battery considered as a civil matter. Coast Guard examiners should seek to eliminate the confusion.

There is a great difference between "assault" and "assault and battery." A survey of the court decisions on the matter convinces me that the element of fear in the victim is never a consideration when "assault and battery" is charged, whether the proceedings be criminal or civil. The element of fear enters only when there is only an apparent attempt to use force with an apparent ability to execute the attempt.

The theory of Appellant is rejected.

II

Most of Appellant's grounds for appeal add up to the same thing, fundamentally, that the Examiner's findings are not supported by the necessary evidence. To support his argument Appellant has meticulously examined each page of the transcript in order to point out "discrepancies" or "contradictions" in the testimony before the Examiner, thence to urge that the Examiner should have found differently from the findings which he did make. This tactic is not persuasive.

Discrepancies in testimony as to matters like assault and battery are to be expected even among eyewitnesses since it is well known that two viewers do not always receive the same impressions of the actions viewed, most particularly in cases in which sudden outbursts of violence are involved. It is a fundamental consistency that must be sought, and such exists here.

The evaluation of credibility of witnesses and the weighing of evidence are functions which I have delegated to examiners to aid the expeditious hearing of cases in such parts of the United States in which hearings can appropriately be held. On appeal, a person is not entitled to a hearing de novo. He is entitled only to a review of the record, from the aspect of fact-finding, such as to determine whether an examiner's findings are based on the determinants in administrative law: reliability, probative value, and substantiality. I say here that I cannot conceive that evidence is reliable, if it is insubstantial and lacking in probative value. Similarly, I cannot see how evidence can be probative if it is not reliable or substantial, nor can I see that evidence which is neither reliable nor probative can be substantial. The three magic words are all facets of the same fundamental consideration.

There is here substantial evidence to support each finding of the Examiner and there is good reason to reject the contention that the Examiner erred in his assigning weight to the evidence upon which he relied.

III

One example from Appellant's lengthy attack on the findings as to the assault and battery of 21 November 1969, the most cogent argument he presents on the point, may be discussed. First, he argues that the Examiner erred in not perceiving that the events that took place involving Appellant and his alleged victim were mere "horseplay" to be expected among ship's officers who played

cards often during a long voyage. Unfortunately for Appellant he did not urge his "horseplay" theory before the Examiner and there is nothing in the record to indicate that the Examiner should have, on his own motion, perceived that laying hands upon another and pushing him against a compartment's bulkhead was not assault and battery but only "horseplay." I know of no commonly received body of knowledge as to practices of merchant marine deck officers who have played cards together for some time which should require that an examiner find on the evidence tending to prove assault and battery in this case, by official notice, that the matter was mere "horseplay."

I point out, however, that the thrust of Appellant's argument here is that of "confession and avoidance." Best stated, although in untimely fashion, the argument is that events occurred as the Examiner found them but that the Examiner misconstrued the intent of Appellant's laying on of hands on Haswell. The defense should have been raised before the Examiner, but it was not. If the argument could properly be raised for the first time on appeal, I could not, on the reasoning expressed above, accept it.

IV

Appellant's argument on 1 March 1970 is again an attack on the Examiner's resolution of conflicts in testimony. There is ample evidence, circumstantial and direct to support the Examiner's finding that Appellant assaulted and battered Haswell in Haswell's room. Despite apparent faults in Haswell's memory, the independent testimony of the witness Hassick is that he saw Appellant, with a piece of a broken bottle in his hand, straddling Haswell on Haswell's bunk, Haswell was unarmed.

It does not matter how a dispute might have arisen, whether Appellant suspected that Haswell had pushed in a screen in Appellant's porthole or harbored a grudge because Haswell had on occasion relieved the watch late. What Hassick saw of the relative positions of the men and of the bloody injury to Haswell clearly establishes assault and battery of a most serious nature.

V

Appellant argues that his prior good record should be considered in determining that revocation is too severe an order. In his brief Appellant acknowledges that he has been going to sea for only two years.

Even if his clear record had been of much longer duration, it would not serve to mitigate an assault and battery which could well have resulted in a fatality.

The order of the Examiner dated at Galveston, Texas on 22 June 1970, is AFFIRMED.

C.R. BENDER

Signed at Washington, D.C., this day of 1971

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